Supreme Court, U.S.
FILED
JUN 18 1992
OFFICE OF THE CLERK

(3)

No. 91-1582

In The

Supreme Court of the United States

October Term, 1991

ELLWEST STEREO THEATRES OF MEMPHIS, INC., d/b/a EXECUTIVE SOUTH, CHARLES LONG, AND RODNEY SKINNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

KLEIN & SHAFER, P.C.
BRADLEY J. SHAFER*
LEE J. KLEIN
P.O. Box 1426
Okemos, MI 48805-1426
517-349-8666

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

ARGUMENT 1

APPENDIX

APPENDIX S ..... App. 101

APPENDIX T ..... App. 104

INDEX OF AUTHORITIES

Page

CASES

Andrews v. State, 652 S.W.2d 370 (Tex. Cr. App. 1983) 5, 8

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 6

Brown v. State, 274 S.E.2d 572 (Ga. App. 1980) 8

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 5

Leech v. American Booksellers Ass'n, 582 S.W.2d 738 (Tenn. 1979) 9

Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) 6

Miller v. United States, 413 U.S. 15 (1973) 9

134 Baker Street, Inc. v. State, 324 S.E.2d 575 (Ga. App. 1984) 8

People v. Ford, 773 P.2d 1059 (Colo. 1989) 9

People v. North Street Book Shoppe, Inc., 530 N.Y.S.2d 869 (N.Y. App. 1980) 9

People v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985) 5, 9

Roth v. United States, 354 U.S. 476 (1957) 6

Sandstrom v. Montana, 442 U.S. 510 (1979) 3

Sedelbauer v. State, 428 N.E.2d 206 (Ind. 1981) 8

Ulster County Court v. Allen, 442 U.S. 140 (1979) 3

United States v. Various Articles of Obscene Merchandise Schedule No. 1769, 600 F.2d 394 (2nd Cir. 1979) 9

INDEX OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 921 3

18 U.S.C. § 1466 ..... 1, 3

OTHER AUTHORITIES

Lentz, *Comparison Evidence in Obscenity Trials,* 15:1 Mich. Journal of Law Reform (Fall 1981) 45, at 66 5

Scott, *Obscenity and the Law: Is it Possible for a Jury to Apply Contemporary Community Standards in Determining Obscenity?,* 14 Law and Human Behavior No. 2, 139 (1990) 8

The Preparation and Trial of an Obscenity Case; a Guide for the Prosecuting Attorney, 2d Ed., Citizens for Decency through Law, Inc., 1988 8

Weaver, *Handbook on the Prosecution of Obscenity Cases,* National Obscenity Law Center (1985) 8

No. 91-1582

In The

Supreme Court of the United States

October Term, 1991

ELLWEST STEREO THEATRES OF MEMPHIS, INC., d/b/a EXECUTIVE SOUTH, CHARLES LONG, AND RODNEY SKINNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

1. Although the government apparently concedes that the newest federal obscenity statute, 18 U.S.C. §1466, is unconstitutional as written, it asserts that the statute's constitutionality is not properly before this Court since the district court acknowledged the invalidity of the presumption, and instructed the jury with, rather, a permissive inference. Opp. Br. 8. This ignores, however, the inherent vagueness of the remaining statute without the invalid presumption (as will be discussed, ***infra***), as well as the issue of whether the trial below should have even occurred at all.

The district court below overruled pretrial motions to dismiss the indictments predicated upon the unconstitutionality of the charging statute, on the mistaken belief that

the mandatory presumption was constitutional. App. E(24). The fact that the court only *later* finally acknowledged the unconstitutionality of the mandatory presumption, and instructed the jury instead with a "permissive inference," does not address the more pointed issue as to whether or not the indictments should have been dismissed prior to trial (or following conclusion of the Government's case), as being founded upon an unconstitutional statute. As this issue was properly raised by way of pretrial, trial, and post-trial motions, and was also raised before the Sixth Circuit, this issue *is* "properly before this Court."

2. The Government next contends that the instructed permissive inference does not offend due process because "[c]ommon experience suggests that the offering for sale of two or more identical items at the same time suggests that the seller is in the business of selling those items." Opp. Br. 9. Yet, merely because Defendants might have sold the two materials still does not answer the question as to whether they are "*engaged in the business*" of selling or transferring *obscene* matter "as a *regular course* of trade or business" (it is and must be, after all, a *rebuttable* inference). In addition, because the mandatory "presumption" is unconstitutional, and therefore lends no support to the "inference" charge, the true issue must be whether the court could have charged the permissive inference *if the criteria of the mandatory presumption had never existed.* The answer is clearly that she could have not.

The Government reaches the opposite conclusion, by blurring the line between protected expression and criminal obscenity, in claiming that the circumstances of this case "strongly supported" the inference because:

> "Petitioners operated several stores in which *sexually explicit materials* were sold and exhibited in "peep shows," and the police officers who purchased the two copies of the videotape selected it at random." Opp. Br. 9 (emphasis added).

Thus, the Government improperly *presumes* all "sexually explicit materials" to be *obscene,* even though the statute does not criminalize (and could not constitutionally do so – see

Pet. 7-8) one who is "engaged in the business" of selling or transferring "*sexually explicit materials*" as a regular course of trade or business.[1]

3. The government asserts that the phrase "engaged in the business" has sufficient standards, *and thus provides fair notice,* because of the "reference to the sale of two items" as found in the mandatory presumption. Opp. Br. 10. Yet, because the mandatory presumption is unconstitutional, and thus that criteria is therefore void *ab initio,* to argue that the statute provides sufficient standards and fair notice (particularly when the record in this case unequivocally establishes that even the trial court was not sure as to who could be charged with violating this statute – Pet. 10-11), defies credibility.[2]

4. The Government's contention that the "record" does not support the claim that the trial court's late decision to instruct the jury with a permissive inference precluded Defendants from presenting evidence to rebut the inference (Opp. Br. 11), is erroneous. See Pet. App. H(36-38), and Pet. App. I(44). In fact, defense counsel indicated that the decision *not* to put on the additional evidence as to the other materials at Ellwest was predicated upon the court's decision on the

---

[1] The Government also relies heavily upon ***Ulster County Court v. Allen,*** 442 U.S. 140 (1979). ***Ulster*** is, however, irrelevant for a number of reasons. First, ***Ulster*** involved an "as applied" challenge as opposed to the facial challenge permissible here because of the potential impact upon First Amendment rights. ***Id.,*** at 155. Second, unlike in ***Ulster,*** the *statutory* presumption at issue here is of the "conclusive or persuasion-shifting variety." ***Sandstrom v. Montana,*** 442 U.S. 510, 519 n.9 (1979). Third, and probably most importantly, ***Ulster*** did not involve a facially unconstitutional presumption as is the case here. Fourth, the statutory inference at issue in ***Ulster*** is simply not analogous to the rebuttable presumption as found within 18 U.S.C. §1466(b).

[2] As noted in the Petition (at 10), because firearms cannot constitutionally be analogized to the distinction between constitutionally protected expressive materials and criminal obscenity, the government's reliance upon the federal firearms statute, 18 U.S.C. §921(a)(21) (Opp. Br. 10), is unavailing.

unconstitutionality of the mandatory presumption. Pet. App. H(37).[3]

5. The Government asserts that the jury instruction regarding "acceptance," rather than the defense argued standard of "tolerance," could not have made a difference in light of the entire jury charge since the term "accept":

> "Cannot reasonably be understood to mean that the entire community must embrace the sexually explicit materials at issue; rather, it can sensibly be viewed only as requiring an evaluation of what the community at large would *tolerate* in its midst." Opp. Br. at 12 (emphasis added).

By this statement, and by other remarks here (*see* Opp. Br. at 12-14), the Government surprisingly concedes that Defendants' position as to the conceptualization of patent offensiveness (Pet. 23-26) is indeed correct. Yet, the Government's conclusion that the jury charge could not possibly be understood to mean a standard of "personal" acceptance or "approval" (which it for the first time now apparently concedes are unconstitutional standards), is incorrect.[4]

---

[3] Any assertion that this argument is somehow waived because Defendants had not motioned the court to reopen their proofs is unavailing, since the trial court's decision was made in a jury charge conference only minutes before closing arguments, and thus would have afforded no opportunity to prepare additional evidence, and in any event, the prosecution had previously requested to reopen its proofs, which was denied by the trial court. (Reply App. S). It is reasonable to conclude that any request from the Defendants would have met a similar fate, particularly given the district court's strong pre-trial statements of disdain of Defendants' theory of rebutting the presumption/inference. See Reply App. T.

[4] Respondent also argues, Opp. Br. 14-15 n.5, that the conflict of utilizing a standard of "decency" as opposed to the concept of "tolerance" should not be considered here because the jury instruction in this action did not refer to a standard of "decency." This conclusion is wrong for two reasons. First, the fundamental issue here is the appropriate (and indeed constitutional) operational definition of the term "patent offensiveness." "Decency" is simply one of the choices utilized by courts and

(Continued on following page)

First, the Government supports its position by noting that the jury was instructed that they were to consider what was "accepted in the community as a whole," and "not by what some persons or groups of persons may *believe* the community as a whole *ought* to accept or refuse to accept." Opp. Br. 12. Yet, because the abstraction of "community standards" is simply a synthesis of the individual opinions from adult community members, merely because the jury was instructed that it was not to consider what *some* people believe *ought* to be accepted, adds nothing to supposedly clarify to the jury that it was to consider what the community "at large would tolerate in its midst." This is particularly true since the naked term "acceptability" is not a "self-defining concept" (Lentz, *Comparison Evidence in Obscenity Trials,* 15:1 Mich. Journal of Law Reform (Fall 1981) 45, at 66). Indeed, as will be discussed below, the jury was unquestionably led to believe that it was to determine the community standards by evaluating what *individuals* in the community would *themselves* "accept"; not what they would "tolerate."

Second, the Government claims that the jury could not have been mislead because it was also instructed not to determine community standards based upon the *effect* of the material on any particularly sensitive person or group, but, rather, by the effect upon the average adult. Opp. Br. 12-13. While the Government does not explain this leap of faith, this observation is erroneous not only for the reason that the opinion or the "average" adult still must be determined on the basis of a composite of opinions of *personal* acceptance, but for the additional reason that the "effect" of the material only

---

(Continued from previous page)

legislatures. Second, and more importantly, "decency" has been equated by a number of courts, including this one, to a standard of "acceptance." ***FCC v. Pacifica Foundation,*** 438 U.S. 726, 739-740 & n.14 (1978); ***People v. Seven Thirty-Five East Colfax,*** 697 P.2d 348, 360 (Colo. 1985); and ***Andrews v. State,*** 652 S.W.2d 370, 377, 379 (Tex. Cr. App. 1983).

relates to the concept of "prurient appeal," and not "patent offensiveness."[5]

In addition, to assert that the jury could not have understood the charge to mean a standard of "personal" acceptance or "approval," belies the record below. From the very beginning of this litigation, the Government had argued that the proper standard for adjudicating obscenity was indeed that of "personal" acceptance or "approval."[6] The Government also raised the exact same argument in the Sixth Circuit by asserting that "[t]he dichotomy between toleration and *personal acceptance* of the average person is a line which must be *carefully drawn and the division created by it strictly observed.*" Gov't C.A. Br. 20 (emphasis added).

The Government was also able to exploit this "strictly observed" "division" in cross-examination of Defendants' expert witnesses (Pet. 25-26; Pet. App. N(62-65, 67-70), and O(75)), and in summation to the jury. Therefore, the Government's position seems to now be that although it successfully argued below that "tolerance" and "acceptance" were distinct concepts (with the jury charge supporting this assertion),[7]

---

[5] ***Roth v. United States,*** 354 U.S. 476, 489-490 (1957); ***Manual Enterprises, Inc. v. Day,*** 370 U.S. 478, 482-483, 487-488 (1962); and ***Brockett v. Spokane Arcades, Inc.,*** 472 U.S. 491, 498-501 (1985).

[6] United States' Motion in Limine to Limit Appeal to Prurient Interest and Patent Offensiveness Test to an Acceptance and not a Toleration Standard, at 2-3; Motion in Limine and Memorandum of Law in Support of Motion in Limine, at 24-26, 29-31, and 38.

[7] The Government also contends that the jury charge must have been construed to provide for a "tolerance" standard because at least one dictionary definition equates tolerance and acceptance (Opp. Br. 12). Yet, the Government submitted *different* "dictionary definitions" of "tolerate" and "toleration" to convince the trial court that such a standard could *not* be utilized to conceptualize the standard of "approval." Motion in Limine and Memorandum of Law in Support of Motion in Limine, at 26 n.6.

which then allowed it to assert in closing that all submitted defense evidence was irrelevant as being predicated upon an inappropriate "tolerance" standard,[8] and although it won

---

[8] Because of the trial court's refusal to make a pretrial ruling on the "tolerance"/"acceptance" issue, the community standards surveys submitted for the defense asked some questions regarding "tolerance," and some regarding "acceptance." The two questions utilizing the "acceptance" standard asked:

> "1. *Is it* or is it *not* acceptable *to you*, for adults in your community to obtain and view such videos and magazines, if they should want to?
>
> 2. Are such *depictions* of nudity and sex in videos and magazines, acceptable or unacceptable *to you*, for adults who want to view them?" (Emphasis in original)

The prosecutor argued to the jury that such questions were really (and improperly) a standard of "tolerance." *See* Pet. App. P(79) ["if you look at what is actually asked by those first four questions, you will see that what the defendants have asked is you, Mr. Respondent, what we are asking you is is it acceptable or not acceptable *for other people to have this material, to purchase this material in your community.* I would submit to you that is a question concerning *toleration. . . . Ladies and Gentlemen, please remember this. The test in this case is not toleration. That is not the issue, whether or not it is tolerated."];* (80) [" . . . the relevant question should have been posed to these people, this representative sample, 'Do you after viewing this film . . . *is this acceptable to you or not?'* Very simple question. They would have said, 'Yes,' it is acceptable to me, or, 'No, it is not acceptable to me.' "]; (81) [same]; (82) ["If they had stopped with that, 'Is it acceptable or unacceptable to you,' period, that would be one question, but, 'Is it acceptable or unacceptable to you for other people to do it,' *that is not the same question Ladies and Gentlemen.*"]; (83) [*"The fact that somebody in this community may tolerate the presence of something like this is one question, but that is not the test.* It is whether this community has accepted this material, the average person."]; (84-85) ["when you get right down to it, the only question that was really asked was, 'Do you tolerate this, other people getting this in the community?' That is the only relevance to this whole lawsuit is that one question *and that is not the test.*"]. Thus, the exact standard as acknowledged by the Government before this Court to be appropriate was specifically repudiated by the U.S. attorney at trial.

(Continued on following page)

convictions predicated upon this distinction, that even though it *now* concedes Defendants' argument is the correct legal position, no harmful or constitutional error occurred. This is obviously erroneous.

Most telling of this issue is the fact that defense counsel requested that the jury simply be instructed that the standard of "acceptance" did not mean "personal approval of the material, but rather acceptance in terms of acceptability for others or in terms of tolerance." Pet. App. M(60). The court, however, refused this request which, as illustrated by n.8, ***supra,*** allowed the U.S. Attorney to argue "personal" acceptance and "approval" in closing. Therefore, it is unavailing to argue that the jurors could not, and did not believe "acceptance" to be anything but a standard of "personal" acceptance or "approval"; standards which the Government now concedes are constitutionally infirm.[9]

The Government also asserts that there is not "any court of appeals or state supreme court decision that conflicts with the unpublished decision below" with regard to the propriety of a *jury charge* of acceptance. Opp. Br. 13. This is surely an

---

(Continued from previous page)

Thus, the Government now argues here that the jury charge could not have been construed to mean *exactly* as the U.S. attorney was arguing to the jury that it, in fact, meant.

[9] There is also an unquestionable *perception* that "tolerance" and "acceptance" are different. For the prosecutors, *see* Weaver, Handbook on the Prosecution of Obscenity Cases, National Obscenity Law Center (1985), at 12; and *The Preparation and Trial of an Obscenity Case; A Guide for the Prosecuting Attorney,* 2d Ed., Citizens for Decency through Law, Inc., 1988, at 22. For the Defendants, *see for example,* ***134 Baker Street, Inc. v. State,*** 324 S.E.2d at 575, 576 (Ga. App. 1984); ***Brown v. State,*** 274 S.E.2d 572, 574 (Ga. App. 1980); and ***Sedelbauer v. State,*** 428 N.E.2d 206, 210-211 (Ind. 1981). *See also* Scott, *Obscenity and the Law: Is it Possible for a Jury to Apply Contemporary Community Standards in Determining Obscenity?,* 14 Law and Human Behavior No.2, 139 (1990), at 140 n.1. *Compare* ***Andrews,*** 652 S.W.2d at 380. Given the instruction solely of "acceptance," there is no reason to believe that jurors would perceive the concepts any less differently.

unfair reading of the case law as cited in the Petition (at 21 n.17), which include many decisions that while not specifically deciding the issue as to the propriety of *jury instructions*, consider the "tolerance"/"acceptance" debate in detail and nevertheless reject a standard of "acceptance" for adjudicating obscenity.[10] Finally, this conflict of the proper operational definition of "patent offensiveness" has lead one circuit to note that, because of lack of direction from this Court, "[i]t has largely been left to us, then, the inferior federal courts, to infer the meaning of the term 'patent offensiveness.' " ***United States v. Various Articles of Obscene Merchandise Schedule No. 1769,*** 600 F.2d 394, 402 (2nd Cir. 1979). Review by this Court is therefore warranted.

Respectfully submitted,

KLEIN & SHAFER, P.C.

BRADLEY J. SHAFER*
LEE J. KLEIN
Attorney for Petitioners
P.O. Box 1426
Okemos, MI 48805-1426
517-349-8666

*Counsel of Record

---

[10] *See also* ***People v. North Street Book Shoppe, Inc.***, 530 N.Y.S.2d 869, 872 (N.Y. App. 1980). In addition, the Government erroneously implies (Opp. Br. 15) that ***Leech v. American Booksellers Ass'n,*** 582 S.W.2d 738 (Tenn. 1979) was decided solely upon state constitutional grounds, when, in fact, that court noted that the standards of "acceptance" and "approval" violated federal constitutional law under ***Miller*** as well. ***Id.***, at 748. Similarly, the Government's citation to ***People v. Ford,*** 773 P.2d 1059 (Colo. 1989) is unavailing for the Colorado Supreme Court had declared "tolerance" to be an appropriate standard pursuant to the federal Constitution, as well as their state constitution. ***Id.***, at 1063-1064; and ***Seven Thirty-Five East Colfax, Inc.***, 697 P.2d at 360-361.

APPENDIX S

[p. 1386] (Whereupon, the hearing of the cause was resumed on this, the 9th day of May, 1990, at 10:15 a.m.)

MR. NEWSOM: May I ask a question, Your Honor?

THE COURT: All right.

MR. NEWSOM: If Your Honor please, I know Your Honor has not made a ruling yet concerning – I assume. I don't know. Has Your Honor made a ruling yet concerning constitutionality of the –

THE COURT: I have denied the motion for judgment of acquittal. We are not going to discuss that right now.

MR. NEWSOM: That's fine, Your Honor.

THE COURT: I just want to move through these experts.

MR. NEWSOM: I have no objection, but I do want to say this, Your Honor. In the event that Your Honor does rule that this is unconstitutional, the presumption which the government is relying on, I am going to be asking Your Honor to reopen my proof with regard to that particular element of the crime based on the fact that it was not raised pretrial, and it was not raised during my putting on the government's case in chief, and it wasn't until we got into the defense proof I found out this was what was going to happen.

I would submit in all fairness the government [p. 1387] should be allowed to go back and open its proof with regard to that element only, Your Honor, since we went

into this trial relying upon that presumption and still rely on it with regard to that particular element under the statute.

I just want to put the Court on notice of the government's position as soon as possible. I know Your Honor doesn't want to talk about that now.

THE COURT: I don't want to talk about it now and I will make one comment about – well, we will talk about it later. It would have been a lot easier for me to permit you to do that if the motion had been made immediately after the defendants made their motion for judgment of acquittal than it is for me to do it now after we are midway through the defendants' proof. It just makes it a much more difficult issue for me to decide whether you should be permitted to do that or not.

MR. NEWSOM: Your Honor, please, the only proof that has been put on with regard to the defendant is one witness.

THE COURT: I understand there has been no proof with reference to this particular issue, but just as far as the jury's hearing of the case and the way the case flows, it is just a lot easier with the jury [p. 1388] to say, "Before you have heard any defense proof, Ladies and Gentlemen, the government has asked to reopen its case, and I have agreed to permit the government to do that for a limited purpose." It is just a lot easier to do that than it is to let the government do it at some point in the middle of the defense case, to do it after the defense is presenting its proof. It is just very difficult.

MR. NEWSOM: That's why I am bringing it up now. If Your Honor is concerned about allowing the government to wait until a later time, I am asking to do it now, Your Honor.

THE COURT: I'm not going to let you do it now, and the reason I'm not going to let you do it now is this. We have had enumerable delays. We have had these experts who came in last week and had many problems arise in the course of the government's proof, and they didn't get to put them on. The defense went to the expense of bringing them back on Monday. We had to adjourn for one day, Tuesday, and now back Wednesday morning, and we are moving straight through the experts and going to try to get them out of town as quick as possible and not going to talk about anything else until we get them off.

* * *

APPENDIX T

* * *

[p. 9] MR. KLEIN: But we hadn't said a hundred on the comparables, but two hundred on the other. As I read the Court's order in terms of what we have a right to present with respect to a rebuttable presumption under the statute, we are going to see two hundred tapes in this case anyway, because as I remember this order, the Court recognizes the right to come in and prove that it is not part of the ordinary course of business [p. 10] for the sale of obscene material, and therefore, we will be bringing in –

THE COURT: That doesn't mean you will get to show every tape.

MR. KLEIN: We have to demonstrate the other materials were not obscene, Your Honor.

THE COURT: I have 403.

MR. KLEIN: I understand, that's why, and quite frankly, Your Honor, I understand what the Court has done here, and quite frankly, what I expected the Court was going to say that it is not vague, it is not ambiguous, but we have a right to bring in and rebutt the rebuttable presumption, and to the extent – I'm not sure how the Court could say we don't have a right to bring in every piece of material in the store, because that is how you prove the rebuttable presumption, that the other materials were not obscene, and it is not part of the regular trade and business, and I would ask the Court to, if the Court for some reason thinks we don't have a right to do that, that that question be certified for appeal.

THE COURT: It is not the sort of question I would think would be certified for appeal. This is just going to be a question of the Court's discretion in terms of how you go about proving something.

[p. 11] MR. KLEIN: I guess my response to the Court is to ask how else do you demonstrate that the other materials are not obscene but by showing it to the jury and giving testimony relevant to the obscenity of those materials?

THE COURT: The other materials are not obscene, and if there is no reasonable question about it – I believe I made this observation before. I believe Dan Newsom will stipulate to you that your vast collection of Disney movies, families, musicals, Oscar winners, et cetera, that those are not obscene, whatever your vast collection is.

MR. KLEIN: None of which are in the store.

MR. NEWSOM: That's right, they don't have any of those, Judge.

MR. KLEIN: None of these are in the store, but that does not mean that the next particular tape that may be sexually specific and graphic is not obscene. It enjoys a protection under the First Amendment until determined to be obscene, and under this statute that they have charged –

THE COURT: If there is a question about the obscenity of every single piece of material in you client's business, I can't see how it would be any service to your client to show them all to this jury.

[p. 12] MR. KLEIN: Because that is the way we have –

THE COURT: It is either one of two ways. Either most of the materials there is not going to be any reasonable question about whether they are obscene or not. The government will stipulate with you about it, and we can do it through a description of the contents and the nature of these tape materials. We can do it a thousand different ways other than showing the movies to the jury. If there is a real question about all these materials you want to show to the jury, your client would be a whole lot better off having never shown them.

MR. KLEIN: If, in fact, the Court is suggesting that I would be willing to discuss with the government a stipulation that the material on trial in the case is basically identical to all of the other materials contained in the store, then the Court doesn't even have to determine the similarity. The Court doesn't have to review it in advance, because they have stipulated to the first prong of Womack, but if they are not stipulating and are saying we have got to prove up our Womack status, that is no different than us having to prove the status of the other material in the store in response to the statute itself and the rebuttable presumption created. As this Court indicated

[p. 13] THE COURT: Let me ask you this. Are all the comparable materials your own materials?

MR. KLEIN: I'm sorry, I didn't hear the last part.

THE COURT: Are all the comparable materials your own materials?

MR. KLEIN: They are all materials from the store, yes.

MR. NEWSOM: That is not what they said in their motion, Your Honor.

MR. KLEIN: We have got three stores. I am still working on trying to obtain information from other stores. As of right now we have all the comparable materials from the three corporate defendant locations.

THE COURT: Well, there are bound to be ways to handle that other than – it doesn't make any sense you would want the jury to sit here for days and days.

MR. KLEIN: It does to me, Your Honor.

THE COURT: It doesn't make any sense to me that you would want that to happen. It is up to you to make those kinds of trial decisions, but I think there would be a very real question about whether you would want to obtain a favorable result for this particular client in this particular case or whether you want to, you know –

* * *

[p. 16] THE COURT: This whole thing does not make any sense to me. Just as a matter of defense strategy it doesn't make any sense to me, but I'm not the one who is crafting the defense strategy.

MR. NEWSOM: I don't know if Your Honor wants me to respond to that or not. I don't know what the defense's strategy is, either, but with regard to – well, I don't really have any comments.

THE COURT: Let's see what it is you tend to seek to introduce. This is what I want. I want the list of what it is you seek to introduce, and by introduce, I mean you want the jury to see it. We are talking about the stuff that is going to take an arguably inordinate amount of time.

Everything you seek to show to the jury in an effort to establish your claim is not, "Engaged in the business."

MR. KLEIN: I can give the Court a summary of that now. It would be my intent to show this jury every video cassette film that was sold in the store.

THE COURT: We want to know what is in there. Is there nothing in this store that the obscenity of [p. 17] which would not be in question?

MR. KLEIN: Unless they are not going to question novelty items, vibrators, things of that nature, undergarments, silk undergarments, things of that nature, but it would be my intent only to submit video tapes, but to bring all of the novelty items. It is my intent to have all the books in the store read to the jury. It is my intent to have every magazine shown to the jury. I acknowledge all of them are of a sexually explicit nature. There are no Walt Disney films in my client's locations, Your Honor. All these negligees are sexually explicit type provative [sic] clothing for women. There are novelty items, vibrators.

THE COURT: There are a zillion ways you can establish that without reading a single book to them, showing them a single film.

MR. KLEIN: How can they known whether or not a particular other sexually explicit video tape is obscene or not under the Miller test without viewing it and considering in its entirety whether it appeals to prurient interest, whether it is patently offensive and whether it lacks serious value? They are obligated to do that to determine whether it is obscene or not, and since the statute mandates that we have – a rebuttable presumption that we have a right to put in [p. 18] evidence to rebutt, how can they make that determination whether it is part of our regular course of business unless they have had an opportunity to see and view the other materials and make a determination whether or not they are obscene? The can't make that determination without looking at the material or hearing the book or looking at the magazine.

THE COURT: If they are all similar to the tape, if everything is just like the tape in this case, you get nothing else by this defense. This case is going to rise and fall on whether the jury thinks this particular tape is obscene, and all you get if you seek to this route is, you know, the increased chance that a very conservative jury will be completely turned off by your client's business. That is just –

MR. KLEIN: I understand the Court's opinion on that, and I have my own beliefs and reasons why I believe it is totally relevant, both under the statute and for the purpose of what we are doing with the jury. Certainly, Your Honor, under these circumstances and in the best interest of my client I think this is the defense that I have to put on. I don't think I have an alternative. If the prosecution is willing to stipulate in effect to the first

prong of Womack and the similarity, we may be able to avoid doing that, but –

[p. 19] THE COURT: He doesn't know what they are.

MR. KLEIN: I have never seen them, and I'm not disposed to stipulate to something, number one, on anything I have never seen.

I mentioned the response that I filed with the Court concerning this issue of similarity, and I will be quiet in a second, but I think there is a distinction between – the defendant says he has to show on his rebuttal presumption everything else in the store was not obscene. I think that the statute states whether or not he is a dealer, engaged in the business of selling materials – well, to tell you the truth, I am too tired to articulate to the Court what I am trying to say.

THE COURT: The focus is not on the nature of every single article in this man's business.

MR. NEWSOM: That is true.

THE COURT: The focus is on what he does for a living.

[p. 20] * * *

MR. KLEIN: If I can point out to the Court on page five of the Court's order that was handed to us the Court notes: "The legislative history suggests that the defendant can rebutt the presumption by evidence that the articles or publications were offered for sale or transfer in the course of carrying on the defendant's general trade or business in lawful books, magazines, audio or

video products, and that he did not, in the regular course of business, devote time, attention or labor to the selling of obscenity." Not the particular film, but of obscenity, and that was what was going on in the store. No difference than if we were B. Dalton and brought in all these films and books and magazines [p. 21] that did not have sexually explicit –

THE COURT: Except as best I can tell from what you are telling me, all these other materials that you want to show to the jury present about the same question as to whether or not they are obscene as the tape that is the subject of this prosecution, which you might as well come in and say, "Ladies and Gentlemen, this is what my client does. He sells stuff like this. Do you think it is obscene or not?"

MR. KLEIN: I have every intention of doing that to the jury, Your Honor, exactly.

THE COURT: There is therefore no reason for you to even worry with the engaged in the business defense, because if you fail – you are not going to succeed on that and fail on other issues. It is going to be one or the other.

* * *